SUPREME COURT, U. S.

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No. 824

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PAN AMERICAN—GRACE AIRWAYS, INC. and BRANIFF AIRWAYS, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, LUFTHANSA GERMAN AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., and MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., and PAN AMERICAN—GRACE AIRWAYS, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT LUFTHANSA GERMAN AIRLINES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix A to the Petition, pp. 7a-23a. The order of the Civil Aeronautics Board is printed as Appendix C to the Petition, pp. 24a-26a.

JURISDICTION

The judgment of the Court of Appeals dismissing the petitions for review was entered on October 30, 1964. (R. 2045; App. D, p. 27a to the Petition). The order of the court denying petitioners' petition for rehearing en banc was entered on December 11, 1964. (R. 2045-A). Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board must set for comparative hearing an application of a foreign air carrier for a specific international route with hearings in a pending, comprehensive route investigation case in which the Board will determine the route structure of several United States citizen air carriers for the area wherein the specific international route is located, where the United States has, by executive agreement antedating the filing of all relevant applications, agreed to grant the route applied for by the foreign air carrier to the country of which such carrier is a national.

2. Whether an order of the Board denying a motion for such comparative hearing is subject to judicial review.

STATUTES, REGULATION, AND EXECUTIVE AGREEMENT INVOLVED

Some pertinent provisions of the statute principally involved, the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 et seq. are set forth in the Petition (pp. 1a-4a). Other pertinent provisions of Sections 101; 401; 402; 406-409; 415; 416; 501; 503; 802; and 1006 are set forth in Appendix A, pp. 1a-10a, to

this Brief. The Regulation involved is the Standardized Government Travel Regulations, Bureau of the Budget Circular No. A-7, some pertinent provisions of which are set forth in Appendix A, p. 10a, to this Brief. The Executive Agreement involved is the Air Transport Agreement Between the United States of America and the Federal Republic of Germany, July 7, 1955, 7 U.S.T. & O. I. A. 527, TIAS 3536. Articles thereof are set forth in Appendix A, pp. 5a-6a of the Petition; additional articles and the entire Exchange of Notes pursuant to the Agreement are set forth in Appendix B, pp. 11a-16a, to this Brief.

STATEMENT

On July 7, 1955, the United States and Germany entered into a bilateral agreement providing for the exchange of air routes between the two countries. (J.A. 8-19). By Exchange of Notes dated the same day, each country secured three routes for its carriers. Germany agreed to give the following routes to carriers chosen by the United States: (1) from the United States via intermediate points to Hamburg and beyond to points in Europe north and east of Germany; (2) from the United States via intermediate points to Dusseldorf-Cologne/Bonn, Frankfurt, Stuttgart and Munich and beyond to points in Europe east and southeast of Germany and beyond; and (3) from the United States via intermediate points to Frankfurt and beyond to points in Europe south and southeast of Germany and beyond to North Africa, the Near East, and beyond. (J.A. 19). The United States agreed to give the following routes to carriers chosen by Germany: (1) from Germany via intermediate points to Boston, New York, and Philadelphia and beyond to points in the Caribbean and beyond to South America; (2) from

Germany via intermediate points to Chicago; (3) from Germany via intermediate points to San Francisco or Los Angeles (the choice to be made by Germany). (J.A. 20). Thus under the route exchange United States carriers were given the right to compete with German carriers from specified points in Germany beyond to points in Europe north, east, south and southeast of Germany and to points in Asia, North Africa, the Near East, and beyond. German carriers were given the right to compete with United States carriers from specified points in the United States to points in the Caribbean and South America. (J.A. 19-20). Competition for traffic beyond the homeland of the granting State was not, however, unlimited: under Article 10 of the Agreement, an airline was required to provide capacity adequate to traffic demands between the country of which the airline is a national and the countries of ultimate destination of the traffic (Appendix B, pp. 12a-13a; J.A. 19-20; J.A. 13). In concrete terms, a United States carrier could not gear its capacity, i.e., provide sufficient seats, for all the traffic between Frankfort and the Middle East, but must relate its capacity to the traffic between the United States and the Middle East; similarly, German capacity for New York-South American traffic was limited to the capacity necessary to transport passengers traveling between Germany and South America.

On February 27, 1964, Lufthansa German Airlines (Lufthansa) filed an application, under Section 402 of the Federal Aviation Act, for an amended foreign air carrier permit, requesting authority to operate beyond New York to points in Jamaica, Ecuador, and the terminal point, Santiago de Chile (J.A. 5-7).[1] At-

[1] Prior to the filing of this application, Lufthansa had been operating under a foreign air carrier permit from Germany to New York (J.A. 6).

tached to the application was a note from the German Embassy to the State Department referring to and reaffirming its earlier designation of Lufthansa as the German carrier to operate the first route granted in the bilateral to German carriers, including that portion of the route beyond New York to South America (J.A. 21). The Lufthansa application was docketed and set for hearing (J.A. 46-50). Braniff Airways, Inc. (Braniff), Pan American—Grace Airways, Inc. (Panagra), Pan American World Airways, Inc. (Pan Am) and The Master Executive Councils of Pilots of Braniff, Panagra, and Pan Am (the Pilots) were granted leave to intervene (J.A. 44-45).

Prior to the date set for hearing, Braniff and Panagra, who, under separate interchange agreements with other carriers, currently provide one plane service between New York and points on the West Coast of South America (Pet. p. 3), moved to defer all proceedings on Lufthansa's application until a decision had been rendered in a proceeding entitled *United States - Caribbean - South American Investigation (Route Case)*, Docket 12895. In the alternative, Braniff and Panagra moved that Lufthansa's application be consolidated with the *Route Case* for decision (J.A. 21-27; 29-31). Whatever other consequences the deferral or, in the alternative, consolidation, would have entailed, it is certain that grant of the motion in either form would have resulted in deferring the Board's recommendation to the President on the Lufthansa application for a number of years. The *Route Case* has been pending since 1961; petitioners' applications for amended certificates in the U.S.-South American market have been on file since 1962; and hearings are not scheduled in that case on the petitioners' appli-

cations—as well as on the competing applications of other U.S. citizen air carriers (J.A. 97-112)—until the spring of 1965. (Pet. p. 4). Early decision in the *Route Case* is impeded not only by the complexities of that very proceeding, but by the fact that a related case—Panagra-Pan American Grace Investigation (See *Pan American World Airways* v. *United States,* 371 U.S. 296 (1963)) may have to be decided either before or contemporaneously with the *Route case* (J.A. 91-92).[2] Thus the practical relief sought by Braniff and Panagra was a deferral of any recommendation to the President regarding Lufthansa's application for several years.

On May 6, 1964, the Board denied Braniff's and Panagra's motion on several grounds: (1) Lufthansa must, by the terms of the bilateral agreement, limit its capacity to the traffic demands between Germany and South America, and therefore its operation cannot exclude a U.S. carrier's application which is geared to the traffic demands between the United States and South America; (2) Braniff and Panagra may, as intervenors, introduce any evidence on the public interest question in the Lufthansa proceeding; and (3) the substantial delay contemplated by the motion in the processing of Lufthansa's application would violate the Board's statutory duty and its policy of processing without delay foreign air carrier applications (J.A. 51-53).

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[2] As the decision in the Court of Appeals stated: "The Route Case has spawned other issues, is very complicated, and hearings in the case will not begin until January 1965." (Hearings have now been postponed until April 20). Petitioners themselves state (Petition, p. 3) that the Route Case is a "major route case in which present-day air service needs between the United States and South America will be considered by the Board."

On June 5, 1964, petitioners filed petitions for review in the Court of Appeals for the District of Columbia Circuit, and motions for an interlocutory injunction to restrain the Board from holding the hearings scheduled on the Lufthansa application. The motions for interlocutory injunctions were granted and the Court of Appeals ordered the parties to agree on an expedited briefing schedule (R. 2046-2048).

On July 1, 1964, Lufthansa and the Board filed motions to dissolve or modify the stay (R. 2079-2096A). Attached to the Board's motion was a letter from the Secretary of State to the Attorney General explaining the interest of the Department of State in securing a dissolution of the injunction, and urging the Attorney General to support the Board's motion (R. 2084-2086). The letter said, in part:

> "So long as the agreement remains in effect, the United States cannot, in our view, be put in the position of telling a foreign country with which we have an international agreement that the question of whether the United States will comply with the agreement must be deferred for a period of years, pending consideration of long-range plans for operations by United States flag carriers." (R. 2085)

The three U.S. citizen air carriers who are designated by the United States to serve the routes granted under the U.S.-German bilateral—Trans World Airlines Inc., (TWA) Seaboard World Airlines, Inc. (SWA) and Pan American World Airways, Inc.—moved for leave to intervene in support of the motions to dissolve the injunctions. The Court granted Pan Am's motion to intervene, and allowed TWA and SWA to file joint-brief as amici curiae (R. 2102).

On September 30, 1964, the motions for dissolution or modification were denied (R. 2050-2052) One month later, the Court dismissed Braniff's and Panagra's petitions for review. The Court held that Braniff and Panagra were not entitled to a comparative hearing with Lufthansa, and hence the Board order deprived Braniff and Panagra of no rights, and was not final. The Court dismissed the petitions for lack of jurisdiction (Pet., p. 13a).

The Court found that the hearings required for applications by citizen carriers under Section 401 of the Act involve different issues than those required for applications by foreign carriers, pursuant to bilateral agreements, under Section 402 of the Act (Pet., p. 12a). Whereas in hearings held on petitioners' applications for the South American route under Section 401, the decisional public interest factors will be economic, in Lufthansa's hearing under Section 402, the decisional public interest factor will be the bilateral agreement. (Pet., p. 13a). And, the Court said, "neither our obligations under bilateral Agreements nor the motives for concluding them are subjects for comparative hearings." (Pet., p. 13a). The Court further found that petitioners' due process rights may be fully protected by their opportunity to submit for Presidential consideration in the Lufthansa proceeding any considerations bearing on the public interest (Pet., p. 13a).

Judge Wright concurred in the Court's opinion, and filed a separate opinion, stating that review of the Board's order was precluded by Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a). Judge Wright cited the Secretary of State's letter to the Attorney General, and said that "It was precisely to

prevent this type of embarrassment to the conduct of our foreign affairs that the Congress denied judicial appeal from Board action on international routes." (Pet., p. 14a).

Judge McGowan dissented, on the ground that the public interest should encompass which of the competing applicants can render the best and cheapest service, and this factor can only be explored in a comparative hearing (Pet., pp. 21a-22a).

Following the Court's decision, petitioners filed a petition for rehearing en banc which was denied by all members of the Court of Appeals, with the exception of Judge Washington, who did not participate (R. 2045a). The Court by order dated December 29, 1964, granted the petitioners' motion for a stay pending application for a writ of certiorari, provided that the petition be filed within fifteen days from the date of the order.

ARGUMENT

I. The Decision of the Court of Appeals Was Correct

1. The decision of the Court of Appeals for the District of Columbia Circuit confirms the unbroken administrative practice of the Civil Aeronautics Board for the past twenty-six years. The Federal Aviation Act of 1958 and its predecessor the Civil Aeronautics Act of 1938 have continued in effect the provisions of law cited by petitioners substantially unchanged since 1938. Until the motion filed below by petitioner Braniff Airways, Inc., with the Civil Aeronautics Board, the issue of *Ashbacker*[3] had never been raised in connection with foreign air carrier applications before the Board. This void occurred notwithstanding the unending

[3] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

march of *Ashbacker* petitions filed in various domestic route cases since 1947.

Thus while the basic contention of petitioners in the instant case is novel, its novelty springs from the mental ingenuity of the petitioners rather than from any inherent newness in the factual or legal situation. Petitioners also stress the importance of the question presented. Here again, the question derives importance only because of petitioners' attack on a practice of long-standing, which if overthrown would certainly produce chaotic conditions in international aviation. In this respect the attack is not unlike an attack on the doctrine of consideration in contract law.

The reason that the Board and its bar have treated foreign air carrier route applications as being on a different footing than domestic route cases is that the statutory system is different in the two lines of cases. In essence, rival applicants in a domestic route case are citizens of the United States, each subject to the same controls, each seeking to serve the United States public, varying primarily only in their ability to serve that public. Comparative consideration promotes public as well as private interest.

Foreign carriers have rarely sought to justify their applications on the grounds of service to the United States public. Respondent Lufthansa is no exception. Its primary objective is to serve German commerce. It has long served that commerce in the Germany-New York market, and in filing its application, which is the subject of this litigation, to extend its route beyond New York to South America, it had no thought of filing a competing application with those of petitioners.

It could not if it would. There is no doctrine of "freedom of the airs" as there is freedom of the seas,

and international airlines need specific authorization from every country they would serve before a route can be opened. In general, these authorizations are secured by bilateral air transport agreements, wherein each government strives to obtain the most advantageous routes for its own carrier or carriers, granting no more than necessary to the other country to assure the bargain.

The primary bargain is the reciprocal exchange of routes between the two bargaining countries. Since, however, many international airline routes touch points in several countries, bilateral agreements usually make provision as a secondary matter for the entire route, including segments which lie wholly between foreign points for the carrier concerned. As to these segments the practice has been to grant limited traffic rights rather than complete freedom to serve.

The United States-German bilateral agreement is typical of this practice. Both Germany and the United States grant reciprocal routes between the territories of the two countries, followed by grants of routes "and beyond" to large geographical areas of the world. (See *supra,* pp. 3-4). With respect to third country traffic, the capacity of each nation's carriers is limited and is to be related to the traffic demand between the home country of the carrier and the third country rather than between the country granting the right and the third country.

Specifically, the limitation which will apply to Lufthansa's carriage of traffic between New York and Latin America (Article 10 of the Agreement, *infra,* pp. 12a-13a) reads as follows:

> "The right to embark or disembark on such services international traffic destined for or coming

> from third countries . . . shall be subject to the general principle that capacity should be related:
>
> a) to traffic requirements between the country of origin and the countries of ultimate destination of the traffic;
>
> b) to the requirements of through airline operation; and
>
> c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services."

Thus the bilateral agreement, which is the source of Lufthansa's claim, itself limits the extent to which Lufthansa can serve the United States public in the route extension to South America.

2. In addition to the third country traffic disabilities agreed to by Germany in the bilateral agreement, Lufthansa also is confronted with a number of infirmities and limitations imposed upon foreign carriers by United States authority. Thus:

The Board is directed to promote "adequate, economical, and efficient service by [U.S. citizen] air carriers". The Board has no promotional duties of any kind regarding foreign air carriers. Section 102(c), Federal Aviation Act, 49 U.S.C. 1302(c).

The Federal Aviation Act of 1958 gives United States flag carriers the assurance that no term, condition, or limitation in a license shall restrict the right of such a carrier to add to or change schedules, equipment, accommodations, or facilities for performing the authorized transportation. Section 401(e)(4), Federal Aviation Act, 49 U.S.C. 1371(e)(4). Not only is there no similar guarantee of freedom for foreign air carriers, but the bilateral agreement expressly

frowns on operation of too great capacity by them. The Board incorporates by reference in the foreign carrier's license all terms of the applicable bilateral agreements.

The Board may exempt U.S. flag carriers from the provisions of Title IV (economic provisions) of the Federal Aviation Act in certain circumstances without hearing. There is no possibility for such an exemption in the case of foreign carriers. Section 416(b)(1), Federal Aviation Act, 49 U.S.C. 1386(b)(1).

A United States flag carrier may not be deprived of its license by revocation except for intentional failure to comply with the economic provisions of the Federal Aviation Act or an order, rule, or regulation issued under those provisions, or of a term, condition, or limitation of the certificate. Section 401(g), Federal Aviation Act, 49 U.S.C. 1371(g). Such a protection attracts investors. There is no corresponding limitation regarding the foreign air carrier's license, and the Board is specifically authorized to revoke the foreign air carrier's permit "whenever it finds such action to be in the public interest". Section 402(f), Federal Aviation Act, 49 U.S.C. 1372(f).

A United States flag carrier is entitled to the payment of subsidy by the Civil Aeronautics Board. Section 406(b), Federal Aviation Act, 49 U.S.C. 1372(b). A foreign carrier can look to the United States Government for no such aid.

Travel regulations of the Bureau of the Budget restrict U.S. government travel on foreign airlines, and direct that such government travel be generally accomplished on United States flag carriers. Standardized Government Travel Regulations, Section 3.10, Bureau of the Budget Circular A-7. (App. A, p. 10a, *infra*).

A foreign air carrier may not own a United States registered aircraft and may not record the ownership of his foreign registered aircraft in the United States Recording System. Sections 501(a), 503(a)(1), Federal Aviation Act, 49 U.S.C. 1401(a), 1403(a)(1).

Finally, a foreign air carrier does not have the United States Government to negotiate traffic rights for it with third countries.

From the point of view of the Civil Aeronautics Board a foreign carrier would be an inadequate substitute for a U.S. citizen carrier. The whole internal corporate life of a foreign carrier is governed by its home country, and the controls which the Board exercises over citizen air carriers as to records and accounts, consolidations, mergers, acquisitions of control, interlocking relationships and the like are outside its direct reach in the case of foreign carriers. Sections 407, 408, 409, Federal Aviation Act, 49 U.S.C. 1377, 1378, 1379.

In the event of emergency, the foreign airline becomes subject to the needs of its own country's national defense effort, and the commerce and defense effort of the United States would perforce be subordinated to the needs of the carrier's home country.

On every score the foreign carrier is not competitive with the United States citizen carrier as an instrumentality of the United States to carry out its policies.

The major respect in which licensing a foreign air carrier serves the public interest of the United States is through the reciprocal routes the United States obtains for its carriers either through bilateral agreement or through comity. Obviously if the United States were unable to carry out its bilateral commit-

ments and refused to grant the route it had undertaken to grant, the reciprocal benefits it obtains through such agreements would soon vanish. In order to obviate any such result Congress specified in Section 1102 of the Act that the Board, in exercising and performing its powers and duties under the Act, do so consistently with any obligation assumed by the United States in any treaty, convention or agreement that may be in force between the United States and any foreign country.

Bilateral Air Transport Agreements, including the United States-German agreement, specifically require the grant of operating permission to the carrier *designated by* the other country. This effectively precludes the choice of a different carrier from the one designated. If such other carrier were selected as superior, the bilateral agreement would have to be denounced or renegotiated (see letter from Secretary of State R. 2085). This brings into consideration the fact that the true contest is not between petitioners and Lufthansa as applicant herein, but between petitioners and the route exchange as a whole in the United States-German agreement.

It is futile to attempt to compare the merits of the United States citizen applicants as *carriers* with the value of a *route* already granted to other United States carriers in a different part of the world, or with future benefits which might be missed because of United States inability to enter into a binding international agreement of this nature. These are public rights, and there is no evidence whatever that Congress intended to pit them against the private interest of a carrier to be selected for a route. As the Court of Appeals said: "But neither our obligations under

bilateral Agreements nor the motives for including them are subjects for comparative hearing (Pet., p. 13a).

3. The Court of Appeals in its opinion below specifically did not reach the question of economic mutual exclusivity, on which petitioners' *Ashbacker* argument rests. Examination of the question reveals a fatal flaw in petitioners' argument. The petitioners cite as the foundation of their case the following quotation from the Board's order instituting the United States-South American *Route Case*:

> "Not only do these services rendered by non-U.S. flag carriers dilute the potential economic support for the services of the U.S. carriers, but also they bring into question the need for point-to-point duplication of such services." (J.A. 56)

Not so quoted but immediately preceding the above is the following:

> "Prior to the decision in the *Latin American Case, supra,* Pan American and Panagra operated in competition with three foreign air carriers. Today, 19 South American foreign air carriers are authorized to serve the United States-South America market. There has also been an increase in service within South America by local carriers." (J.A. 56)

These 19 South American carriers, like petitioners, each have primary traffic rights between their home countries and the United States. As noted earlier, p. 4, Lufthansa has only secondary entitlement to this traffic since for Lufthansa it is third country traffic.

At the time the South American proceeding was instituted, Lufthansa had not filed its petition, although

entitled to do so since 1955 when the United States-German agreement was signed. The Board made no mention of possible Lufthansa competition, but said with respect to the services of the 19 South American carriers that they brought into question the need for point-to-point duplication of the U.S. flag services in South America. In short, regardless of the earlier need[4] for point-to-point competition between U.S. flag carriers, the benefits of competition were now being furnished by the 19 South American carriers. Thus the thrust of the Board's preliminary finding that foreign air carrier services might obviate the need for duplication of citizen air carrier services was not that foreign air carriers rendered competition between U.S. carriers uneconomic, but that they made such competition unnecessary in the public interest.[5]

Consequently, while service by Lufthansa might conceivably have an impact on the revenue of the 20-odd other carriers serving the South American market, such impact neither adds to nor detracts from the Board's tentative conclusion that the point-to-point competition previously supplied by U.S. carriers only may no longer be necessary in the public interest.

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[4] The declaration of policy of the Federal Aviation Act of 1958 and of the Civil Aeronautics Act of 1938 included a policy endorsing—"Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." Federal Aviation Act, Sec. 102(c), 49 U.S.C. 1302(c).

[5] There is no indication that the addition of one or more foreign carriers to the 19 in existence would in any way alter the Board's thinking. On the contrary, the Board's staff study on which the order was based specifically contemplated the addition of more foreign carriers (J.A. 67).

II. There Is No Conflict in Precedent

The decision below was not in conflict with any decisions of any other courts of appeal, any applicable decisions of this Court, nor indeed with the procedure "normally applied" by the Civil Aeronautics Board. There is thus no conflict for this Court to resolve.

III. The Order Comes Within the Ambit of Presidential Review and Judicial Review Is Barred

The Court of Appeals based its principal holding on the fact that because petitioners were not entitled to comparative consideration, the Board's order denying it was not a final order and therefore not reviewable. Jurisdiction is also barred by Section 1006(a) of the Federal Aviation Act. This section specifically prohibits review of "any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act." In *Chicago and Southern Airlines* v. *Waterman S.S. Corporation,* 333 U.S. 103 (1948), this Court declined to review a Board order denying a *citizen* carrier application for an overseas route because, although not literally barred by Section 1006(a), it was issued in a case which was for ultimate Presidential determination. This Court did not restrict its holding to orders emanating only after Presidential action. Rather, this Court stated that orders not submitted to the President "are not mature and are therefore not susceptible to review at any time" (333 U.S. at 110). Procedural orders which are issued in matters requiring ultimate Presidential determination have been denied review in the Court of Appeals under Section 1006(a) and the *Chicago and Southern Airlines* case. *British Overseas Airways Corp.* v. *Civil Aeronautics Board,* 113 App. D.C. 76, 304 F. 2d 952 (1962); *United States Overseas Airlines*

v. *Civil Aeronautics Board*, 95 App. D.C. 363, 222 F. 2d 303 (1955). The rationale of the *Chicago and Southern Airlines* and *British Overseas Airways Corp.* cases were relied on by Judge Wright as an additional grounds for dismissing the petitions for review, and constitute an independent basis for support of the result reached by the Court below.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 29, 1965

APPENDIX A

Pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, et seq., in addition to the pertinent provisions printed on pages 1a-4a of the Petition, read as follows:

Definitions

Sec. 101. As used in this Act, unless the context otherwise requires—

. . .

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

. . .

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

• • •

Certificate of Public Convenience and Necessity

Certificate Required

Sec. 401. . . .

(e)(4) No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; except that the Board may impose

such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d)(3) of this section.

. . .

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

. . .

Permits to Foreign Air Carriers

Permit Required

Sec. 402. . . .

Terms and Conditions of Permit

(e) The Board may prescribe the duration of any permit and may attach to such permit such reasonable terms, conditions, or limitations as, in its judgment, the public interest may require.

Authority to Modify, Suspend, or Revoke

(f) Any permit issued under the provisions of this section may, after notice and hearing, be altered, modified, amended, suspended, cancelled, or revoked by the Board

whenever it finds such action to be in the public interest. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, modification, amendment, suspension, cancellation, or revocation of a permit.

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Rates for Transportation of Mail

Authority to Fix Rates

Sec. 406. (a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same.

Rate Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certif-

icates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

. . .

Accounts, Records, and Reports

Filing of Reports

Sec. 407. (a) The Board is empowered to require annual, monthly, periodical, and special reports from any air carrier; to prescribe the manner and form in which such reports shall be made; and to require from any air carrier specific answers to all questions upon which the Board may deem information to be necessary. . . .

Disclosure of Stock Ownership

(b) Each air carrier shall submit annually, and at such other times as the Board shall require, a list showing the names of each of its stockholders or members holding more than 5 per centum of the entire capital stock or capital, as the case may be, of such air carrier, ...

. . .

Form of Accounts

(d) The Board shall prescribe the forms of any and all accounts, records, and memoranda to be kept by air carriers, ...

Inspection of Accounts and Property

(e) The Board shall at all times have access to all lands, buildings, and equipment of any carrier and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers; . . . .

Consolidation, Merger, and Acquisition of Control

Acts Prohibited

Sec. 408. (a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier, and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged

in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

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Prohibited Interests

Interlocking Relationships

Sec. 409. (a) It shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stock-

holder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

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* * *

Inquiry Into Air Carrier Management

Sec. 415. For the purpose of exercising and performing its powers and duties under this Act, the Board is empowered to inquire into the management of the business of any air carrier and, to the extent reasonably necessary for any such inquiry, to obtain from such carrier, and from any person controlling or controlled by, or under common

control with, such air carrier, full and complete reports and other information.

Classification and Exemption of Carriers

Sec. 416.

. . .

Exemptions

(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

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Registration of Aircraft Nationality

Registration Required

Sec. 501 (a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or (except as provided in section 1108 of this Act) to operate or navigate within the United States any aircraft not eligible for registration: *Provided,* That aircraft of the national-defense forces of the United States may be operated and navigated without being so registered if such aircraft are identified, by the agency having jurisdiction over them, in a manner satisfactory to the Administrator. The Administrator may, by regulation, permit

the operation and navigation of aircraft without registration by the owner for such reasonable periods after transfer of ownership thereof as the Administrator may prescribe.

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* * *

Recordation of Aircraft Ownership

Establishment of Recording System

Sec. 503. (a) The Administrator shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, civil aircraft of the United States;

. . .

* * *

The Department of State

Sec. 802. The Secretary of State shall advise the Administrator, the Board, and the Secretary of Commerce, and consult with the Administrator, Board, or Secretary, as appropriate, concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services.

* * *

Judicial Review of Orders

Orders of Board and Administrator Subject to Review

Sec. 1006. (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals

for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

. . .

* * *

Pertinent provisions of the Standardized Government Travel Regulations, Bureau of the Budget Circular No. A-7 read as follows:

3.10 *Use of American airplanes.*

a. The term "American airplane," as used in this subsection, means an airplane registered under the laws of the United States but excluding those operating under certificates or permits held by foreign airlines.

b. As a general rule, employees shall use American airplanes where travel is performed by commercial air transportation between the United States and a foreign country or between foreign countries . . . .

c. Where the use of foreign airplane is authorized or approved under b, above, the reason therefor is to be entered on, or attached to, the travel order or other authorizing document, or travel voucher.

APPENDIX B

Pertinent provisions of the Air Transport Agreement between the Federal Republic of Germany and the United States of America, TIAS 3536 (in addition to the pertinent provisions printed on pages 5a-6a of the Petition) and the full Exchange of Notes pursuant thereto read as follows:

ARTICLE 4

Each contracting party reserves the right to withhold or revoke the operating permission provided for in Article 3 of this Agreement from an airline designated by the other contracting party in the event that it is not satisfied that substantial ownership and effective control of such airline are vested in nationals of the other contracting party, or in case of failure by such airline to comply with the laws and regulations referred to in Article 5 hereof, or in case of the failure of the airline or the government designating it otherwise to perform its obligations hereunder, or to fulfill the conditions under which the rights are granted in accordance with this Agreement.

ARTICLE 5

(1) The laws and regulations of one contracting party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft utilized by the airline or airlines designated by the other contracting party, and shall be complied with by such aircraft upon entering or departing from and while within the territory of the first contracting party.

(2) The laws and regulations of one contracting party relating to the admission to or departure from its territory of passengers, crew, or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on

behalf of such passengers, crew or cargo of the other contracting party upon entrance into or departure from, and while within the territory of the first contracting party.

* * *

ARTICLE 8

There shall be a fair and equal opportunity for the airlines of each contracting party to operate on any route specified in accordance with paragraph (2) of Article 2 of this Agreement.

ARTICLE 9

In the operation by the airlines of either contracting party of the air services over the routes described in accordance with paragraph (2) of Article 2 of this Agreement, the interest of the airlines of the other contracting party shall be taken into consideration so as not to affect unduly the services which the latter provide on all or part of the same routes.

ARTICLE 10

(1) The air services made available to the public by the airlines operating under this Agreement shall bear a close relationship to the requirements of the public for such services.

(2) It is the understanding of both contracting parties that services provided by a designated airline under the present Agreement shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the countries of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for or coming from third countries at a point or points on the routes specified in accordance with paragraph (2) of Article 2 of this Agreement shall be applied in accordance with the general principles of

orderly development to which both contracting parties subscribe and shall be subject to the general principle that capacity should be related:

(a) to traffic requirements between the country of origin and the countries of ultimate destination of the traffic;

(b) to the requirements of through airline operation; and

(c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

* * *

ARTICLE 12

(1) Consultation between the competent authorities of both contracting parties may be requested at any time by either contracting party for the purpose of discussing the interpretation, application, or amendment of the Agreement or Route Schedule. Such consultation shall begin within a period of sixty (60) days from the date of the receipt of the request by the Department of State of the United States of America or the Ministry of Foreign Affairs of the Federal Republic of Germany as the case may be.

(2) Should agreement be reached on amendment of this Agreement such amendment shall become effective when it has been approved in accordance with the procedure set forth in Article 17 of this Agreement.

(3) Should agreement be reached on amendment of the Route Schedule, such agreement shall become effective on the date of an exchange of diplomatic notes in accordance with the procedure provided in paragraph (2) of Article 2 for the initial establishment of the Route Schedule.

(4) A frequent exchange of ideas will take place between the aeronautical authorities of the two parties in order to achieve close cooperation in all matters concerning the present Agreement.

ARTICLE 13

(1) Except as otherwise provided in this Agreement, any dispute between contracting parties relative to the interpretation or application of this Agreement which cannot be settled through consultation shall be submitted for an advisory report to a mixed commission of three members, one to be named by each contracting party, and the third to be agreed upon by the two members so chosen, provided that such third member shall not be a national of either contracting party. Each of the contracting parties shall designate a member within two months of the date of delivery by either party to the other party of a diplomatic note requesting settlement of a dispute; and the third member shall be agreed upon within one month after such period of two months.

(2) If either of the contracting parties fails to designate its own member within two months, or if the third member is not agreed upon within the time limit indicated, either party may request the President of the International Court of Justice to make the necessary appointment or appointments by choosing the member or members.

(3) The contracting parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. Each contracting party shall bear the expenses arising out of the activity of its member as well as one half of the expenses arising out of the activity of the third member.

* * *

ARTICLE 16

Either of the contracting parties may at any time notify the other of its intention to terminate the present Agreement. Such a notice shall be sent simultaneously to the International Civil Aviation Organization. In the event such communication is made, this Agreement shall terminate one year after the date of its receipt, unless by agree-

ment between the contracting parties the notice of intention to terminate is withdrawn before the expiration of that time. If the other contracting party fails to acknowledge receipt, notice shall be deemed as having been received fourteen (14) days after its receipt by the International Civil Aviation Organization.

* * *

DEPARTMENT OF STATE
WASHINGTON

July 7, 1955

The Honorable
Albrecht von Kessel,
Charge d'Affaires ad interim
of the Federal Republic
of Germany

Sir:

I refer to paragraph 2 of Article 2 of the Air Transport Agreement between the United States of America and the Federal Republic of Germany, signed on July 7, 1955.

In the negotiations which have been conducted in connection with the above-mentioned agreement, it has been agreed that air services may be operated in accordance with the following route schedule.

ROUTE SCHEDULE

A. An airline or airlines designated by the Government of the United States of America shall be entitled to operate air services on each of the air routes specified via intermediate points, in both directions, and to make scheduled landings in the Federal Republic of Germany at the points specified in this paragraph:

1. From the United States of America via intermediate points to Hamburg and beyond to points in Europe north and east of the Federal Republic of Germany.

2. From the United States of America via intermediate points to Dusseldorf-Cologne/Bonn, Frankfort, Stuttgart and Munich and beyond to points in Europe east and southeast of the Federal Republic of Germany and beyond.

3. From the United States of America via intermediate points to Frankfort and beyond to points in Europe south and southeast of the Federal Republic of Germany and beyond to North Africa, the Near East and beyond.

B. An airline or airlines designated by the Government of the Federal Republic of Germany shall be entitled to operate air services on each of the air routes specified via intermediate points, in both directions, and to make scheduled landings in the United States of America at the points specified in this paragraph:

1. From the Federal Republic of Germany via intermediate points to Boston, New York and Philadelphia and beyond to points in the Caribbean Sea and beyond to South America.

2. From the Federal Republic of Germany via intermediate points to Chicago.

3. From the Federal Republic of Germany via intermediate points to San Francisco or Los Angeles.*
*Selection of the terminal point in the United States of America to be determined by the Federal Republic of Germany at a later date.

C. Points on any of the specified routes may at the option of the designated airline be omitted on any or all flights.

I should be very grateful if you would inform me of the concurrence of the Government of the Federal Republic of Germany in the foregoing route schedule.

Accept, Sir, the renewed assurances of my high consideration.

/s/ Herbert Hoover, Jr.